National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-108 OF 1995
NH CHAN, ABU MANSOR AND HAIDAR JJCA
11 DECEMBER 1999

Labour Law *— Industrial Court — Dismissal of unionized employee — Credibility of witness within jurisdiction of Industrial Court — Whether High Court entitled to substitute its own findings of fact — Whether High Court judge exceeded its role in interfering with Industrial Court's decision*

By letters dated 15 September 1988, four workers ('the claimants') employed by the respondent were individually issued identical notices of a domestic inquiry wherein they were subsequently found guilty of inciting and instigating other workers from going to work. By letters dated 29 September 1988, the claimants were individually informed, inter alia, that they were downgraded from tappers to general workers with effect from 30 September 1988 and that they were to report for work on 1 October 1988. By letters dated 30 September 1988 and 1 October 1988 respectively, the claimants jointly applied for leave until resolution of the dispute over the downgrading by a union committee. The respondent rejected these applications. None of the claimants reported for work on 1 October 1988 as required. By letters dated 7 October 1988, the respondent put the claimants on notice that they were to report for work on 8 October 1988 and that failure to do so would be considered as the claimants had abandoned their employment. The claimants applied for leave from 7 October 1998 but was rejected by the respondent. The claimants did not report for work on 8 October or at any time thereafter. On 16 October 1998, the applicant terminated their employment due to the continued absence and pursuant to s 15(2) of the Employment Act 1955. The dispute over the dismissal was referred to the Industrial Court. The Industrial Court found as a fact that the estate manager of the respondent had waived the claimants' absence from 1 October 1998 to 15 October 1988 as stated by him in his sworn testimony. The Industrial Court ordered that the claimants be reinstated as tappers from the date of dismissal. The respondent applied for certiorari to quash the award of the Industrial Court. The High Court allowed the application and held that the Industrial Court had erred in its finding that the respondent had waived or condoned the claimants' absence. The appellant appealed. The respondent contended that the issue of waiver or condonation should not be dealt with by the Court of Appeal on the ground that it was not pleaded in the statement of case.

Held, allowing the appeal:

(1) Even if the issue of condonation was not specifically pleaded, the fact that this issue was fully argued both in the Industrial Court

and the High Court without any objection would be too late in the day for the respondent to contend that this issue be precluded from being relied on by the appellant as a ground (see p 152C); *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin* [1994] 3 MLJ 185 followed, *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750 and *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 distinguished.

(2) Although the estate manager did not expressly state that the waiver was up to 16 October 1998, from the tone of his evidence, the irresistible inference must be that the waiver was up to 15 October 1988. This was borne out by his answer to the question put to him. By the use of the words, 'I now say' clearly showed that the witness tried to correct himself that prompted the Industrial Court to say that the witness did a 'virtual turnaround'. This was a matter of credibility of the witness and was within the competence and jurisdiction of the Industrial Court to determine his credibility (see pp 154E–F, I–155A).

(3) The judge clearly was wrong to make a finding that the Industrial Court based its decision on no evidence and that its decision was perverse when there was more than ample evidence before the Industrial Court that the dismissal of the claimants was without just cause or excuse, ie their absence was condoned or waived by the respondent. In the circumstances, it was wrong for the judge in a supervisory role to substitute his own finding of fact when such role was much within the province of the Industrial Court. On the evidence before it, the Industrial Court was more than justified to come to such finding of fact and to its assessment of the credibility of the estate manager. In short, the Industrial Court correctly concluded that the claimants' absence from 29 September 1988 to 15 October 1988 was condoned or waived by the respondent. In the event, the termination of the claimants' employment by the respondent was rightly found by the Industrial Court to be invalid (see pp 155I–156D).

(4) The Industrial Court did not commit any error or errors of law and had correctly considered the facts before it and the law applicable thereto. It was the judge who was wrong and who had exceeded his role (see p 157C–D).

[Bahasa Malaysia summary

Melalui surat-surat bertarikh 15 September 1988, empat orang pekerja ('pihak-pihak menuntut') yang diambil bekerja oleh responden telah seorang demi seorang diberi notis-notis siasatan domestik yang sama di mana mereka telah didapati bersalah kerana mengapi-apikan dan menghasut pekerja-pekerja lain daripada pergi bekerja. Melalui surat-surat bertarikh 29 September 1988, pihak-pihak menuntut telah diberitahu seorang demi seorang, antara lain,

bahawa mereka telah diturunkan pangkat daripada penoreh getah kepada pekerja am mula berkuat kuasa pada 30 September 1988 dan bahawa mereka sepatutnya melaporkan diri untuk bekerja pada 1 Oktober 1988. Melalui surat-surat bertarikh 30 September 1988 dan 1 Oktober 1988 masing-masing, pihak-pihak menuntut telah memohon secara bersesama untuk bercuti sehingga penyelesaian pertikaian tentang penurunan pangkat malalui jawatankuasa kesatuan. Responden menolak permohonan-permohonan tersebut. Tidak seorang pun daripada pihak-pihak menuntut melaporkan diri untuk bekerja pada 1 Oktober 1988 sebagai mana yang dihendaki. Melalui surat-surat bertarikh 7 Oktober 1988, responden telah membuat notis terhadap pihak-pihak menuntut bahawa mereka sepatutnya melaporkan diri untuk bekerja pada 8 Oktober 1988 dan bahawa kegagalan untuk berbuat demikian akan dianggap sebagai meninggalkan pekerjaan mereka. Pihak-pihak menuntut telah memohon cuti daripada 7 Oktober 1988 tetapi telah ditolak oleh responden. Pihak-pihak menuntut tidak melaporkan diri untuk bekerja pada 8 Oktober 1988 atau pada bila-bila masa selepas itu. Pada 16 Oktober 1988, pemohon telah menamatkan pekerjaan mereka oleh sebab ketidakhadiran yang berterusan dan menurut s 15(2) Akta Pekerjaan 1955. Pertikaian tentang pemecatan tersebut telah dirujukkan kepada Mahkamah Perusahaan. Mahkamah Perusahaan telah mendapati bahawa pada hakikatnya pengurus estet responden telah megetepikan ketidakhadiran pihak-pihak menuntut daripada 1 Oktober 1988 hingga 15 Oktober 1988 sebagai mana yang dinyatakan oleh beliau di dalam akuan sumpah beliau. Mahkamah Perusahaan memerintahkan agar pihak-pihak menuntut tersebut dipulangkan semula jawatan mereka sebagai penoreh getah daripada tarikh pemecatan tersebut. Responden telah memohon certiorari untuk membatalkan award Mahkamah Perusahaan. Mahkamah Tinggi telah membenarkan permohonan tersebut dan memutuskan bahawa Mahkamah Perusahaan telah salah di dalam penemuan bahawa responden telah mengetepikan atau memaafkan ketidak-hadiran pihak-pihak menuntut tersebut. Perayu telah membuat rayuan. Responden menegaskan bahawa isu penepian atau pemaafan tidak sepatutnya dibicarakan oleh Mahkamah Rayuan atas alasan bahawa ia tidak dipohon di dalam penyataan kes.

Diputuskan, membenarkan rayuan tersebut:

(1) Walaupun isu pemaafan tidak dipohon secara khusus, hakikat bahawa isu ini telah dihujahkan dengan sepenuhnya di kedua-dua Mahkamah Perusahaan dan Mahkamah Tinggi tanpa sebarang bantahan menunjukkan sudah terlambat untuk responden menegaskan bahawa isu ini dihalang daripada perayu bergantung kepadanya sebagai satu alasan (lihat ms 152C); *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin* [1994] 3 MLJ 185 diikut, *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750 dan *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 dibeza.

(2) Walaupun pengurus estet tersebut tidak dengan nyata menyebutkan bahawa penepian adalah sehingga 16 Oktober 1998, daripada nada keterangan beliau, wujud inferens yang tidak dapt ditolak bahawa sepatutnya penepian tersebut adalah sehingga 15 Oktober 1998. Melalui penggunaan perkataan 'I now say' jelas menunjukkan bahawa saksi cuba membetulkan dirinya yang telah menyebabkan Mahkamah Perusahaan mengatakan bahawa saksi telah membuat satu 'virtual turnaround'. Ini merupakan satu perkara kebolehpercayaan seorang saksi dan di dalam kompetens dan bidang kuasa Mahkamah Perusahaan untuk menentukan kebolehpercayaan beliau (lihat ms 154E–F, I–155A).

(3) Hakim dengan jelas khilaf di dalam membuat satu penemuan bahawa Mahkamah Perusahaan telah mendasarkan keputusannya pada keterangan yang tidak ada dan bahawa keputusannya adalah berlawanan sedangkan terdapat keterangan yang lebih daripada mencukupi di hadapan Mahkamah Perusahaan bahawa pemecatan pihak-pihak menuntut adalah tanpa sebab atau alasan yang adil, iaitu ketidakhadiran mereka telah dimaafkan atau ditepikan oleh responden. Di dalam keadaan ini, adalah salah untuk hakim di dalam peranan penyeliaan menggantikan penemuan fakta beliau sendiri sedangkan peranan sedemikian adalah di dalam bidang kuasa Mahkamah Perusahaan. Berdasarkan keterangan yang dihadapkan, Mahkamah Perusahaan telah lebih daripada mempunyai justifikasi yang kuat untuk sampai ke satu penemuan fakta dan kepada penilaiannya tentang kebolehpercayaan pengurus estet. Secara ringkasnya, Mahkamah Perusahaan betul di dalam membuat kesimpulan bahawa ketidakhadiran pihak-pihak menuntut tersebut daripada 29 September 1988 hingga 15 Oktober 1988 telah dimaafkan atau ditepikan oleh responden. Malahan, penamatan pekerjaan pihak-pihak menuntut oleh responden telah didapati betul oleh Mahkamah Perusahaan sebagai tidak sah (lihat ms 155I–156D).

(4) Mahkamah Perusahaan tidak melakukan apa-apa kesilapan atau kekhilafan dari segi undang-undang dan telah mempertimbangkan dengan betul fakta-fakta yang telah dihadapkan dan undang undang terpakai ke atasnya. Hakimlah yang telah membuat kesilapan dan telah melampaui peranan beliau (lihat ms 157C–D).]

Notes

For a case on dismissal of unionized employee, see 8 Mallal's Digest (4th Ed, 1998 Reissue) para 1060.

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750 (distd)

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)
Manager Scudai Estate, Johore Bahru, The v Narayanan [1960] MLJ 162 (refd)
Persatuan Pengeluar-Pengeluar Pertanian Tanah Melayu v Kesatuan Kebangsaan Pekerja-Pekerja Ladang [1986] ILR 586 (Award No 111/86) (refd)
R Rama Chandran v The Industrial Court of Malaysia [1997] 1 CMJ 145 (distd)
Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185 (folld)
William Jacks & Co (M) Sdn Bhd v S Balasingam [1997] 3 AMR 2585 (refd)

Legislation referred to

Employment Act 1955 s 15(2)
Industrial Relations Act 1967 s 26(2)
Rules of the High Court 1980 O 18 r 7(1), O 53

Appeal from: Originating Motion No R2–25–90 of 1993 (High Court, Kuala Lumpur)

B Lobo (*Lobo & Associates*) for the appellant.
Thavalingam Thavarajah (*Shearn Delamore & Co*) for the respondent.

Haidar JCA (delivering the judgment of the court): Pursuant to a reference by the then Minister of Labour dated 22 December 1988 under s 26(2) of the Industrial Relations Act 1967 concerning a trade dispute between Kumpulan Jerai Sdn Bhd, Simpang Rengam ('KJSB') and the National Union of Plantation Workers ('NUPW') in connection with the dismissal of NUPW's members, Ali bin Gula Mohammad, Kamin bin Nasimin, Athinaidu s/o Appalasamy and Muhamad bin Abu Bakar ('the claimants') on 16 October 1988, the Industrial Court on 17 June 1993 vide Award No 180 of 1993 made the following orders:

(1) That the four dismissed claimants be reinstated as tappers from the date of dismissal, 16 October 1988;

(2) The above four claimants be paid their backwages, allowances, increments and all other entitlements from the date of the dismissal to the date of reinstatement;

(3) The four claimants be reinstated within one month of the date of this award;

(4) That all backwages, allowances, increments ordered be paid within one month of the date of the award.

The four claimants were employees of KJSB as well as officials of the estate Union Committee of NUPW.

Being dissatisfied with the order of the Industrial Court, KJSB on 28 July 1993 filed an application for leave for an order of certiorari pursuant

A to O 53 of the Rules of the High Court 1980 and leave was granted by the High Court on 29 September 1993. On 4 October 1993 KJSB filed the notice of motion for an order of certiorari to remove into the High Court for the purpose of quashing the order of the Industrial Court of 17 June 1993 vide Award No 180 of 1993 (p 333 of the appeal record). The High Court on 15 August 1995 made an order in terms of the application of KJSB with
B costs (p 21 of the appeal record). Hence the appeal by NUPW before us.

We heard the appeal by NUPW against the order dated 15 August 1995 by the High Court on 23 March 1999. We allowed the appeal and ordered that the award of the Industrial Court be restored. We now give our reasons.

C *Background*

KJSB is a member of the Malaysian Agricultural Producers Association (MAPA) and the first respondent in Industrial Court Award No 111/86 in *Persatuan Pengeluar-Pengeluar Pertanian Tanah Melayu v Kesatuan Kebangsaan Pekerja-Pekerja Ladang* (1986) ILR 586 (Award No 111/86).

D Following acts of alleged misconduct, the four claimants were individually issued identical letters dated 15 September 1988 suspending them from work pending the two charges preferred therein to be heard on 20 September 1988. The hearing of the two charges against them was heard on 20, 21, 22 and 23 September 1988 by the inquiry panel set up by KJSB and they were found guilty on the first charge only (pp 173–245 of the
E appeal record). It seemed that the alleged misconduct of the four claimants started with the death of a retired female tapper, Pangaroo d/o Kuppusamy on the estate of KJSB at about 7.30pm on 13 September 1988. It was related to unpaid leave for the Indian workers to attend the funeral. The claimants were found to have incited and instigated workers of KJSB on
F 13 September 1988 from going to work on 14 September 1988. As a result the four claimants were recommended to be downgraded from tappers to general workers by the Inquiry Panel.

By letters dated 29 September 1988, the four claimants were individually informed:

G (a) they had been found guilty of misconduct;

(b) by way of punishment, they were downgraded to general workers with effect from 30 September 1988;

(c) they were to report for work on 1 October 1988; and

(d) they may appeal against the downgrading decision in accordance with
H the Redressal Procedure as provided for in Award No 111/86.

The four claimants were not satisfied with the decision and by letter dated 29 September 1988, jointly informed KJSB accordingly of their dissatisfaction and requested to meet KJSB on 30 September 1988 at 3.30pm to resolve the matter. By letter dated 1 October 1988 KJSB
I informed each of the claimants that the meeting they had requested could not be accommodated but agreed for it to take place on 3 October 1988 at 3.30pm.

The meeting scheduled on 3 October 1988 did not take place as none of the claimants turned up.

By letter dated 30 September 1988, the four claimants jointly applied for leave until resolution of the dispute over their downgrading by their Union Branch (Kluang).

By letter dated 1 October 1988, KJSB immediately informed the four claimants individually that their leave application was not approved for failure to comply with the prescribed procedure for annual leave.

None of the four claimants reported for work on 1 October 1988 as required.

Subsequently, the four claimants also individually submitted leave application forms dated 1 October 1988 for three days' leave commencing from 1 October to 3 October 1988. KJSB only received these leave application forms on 1 October 1988 at 4.35pm. The four claimants were individually informed that their applications were also not approved when their applications were marked 'not approved' on the said forms. The four claimants did not report for work as required on 2, 3, 4, 5 and 6 October 1988.

By letter dated 7 October 1988 KJSB wrote to each of the four claimants stating:

(i) their absence from work without prior permission after being informed of the rejection of their leave amounted to serious misconduct for which disciplinary action could be taken;

(ii) they were reminded to report for work on 8 October 1988;

(iii) they were warned that if they repeat their failure to report for work again, KJSB would consider that they were no longer interested in continuing with their employment and that they will be considered to have abandoned their employment; and

(iv) they have to take up their grievance in accordance with Award No 111/86.

Upon receipt of KJSB's letter dated 7 October 1988, the four claimants again jointly applied for leave from 7 October 1988 to such time as their case was resolved by their Union Branch, Kluang. This application for leave was rejected by KJSB by letter dated 8 October 1988 addressed to the individual claimant. KJSB in the same letter warned the claimants that if they failed to report for work on 8 October 1988 without prior permission, KJSB would consider them as having breached their contracts of service. The four claimants did not report for work on 8 October 1988 or at any time thereafter.

By letter dated 16 October 1988 addressed to the claimants individually, they were informed that by virtue of their absence from work and pursuant to s 15(2) of the Employment Act 1955, they have ceased to be employees of KJSB with effect from 16 October 1988.

The dispute between KJSB and NUPW over the dismissal of the four claimants with effect from 16 October 1988 was referred to the Industrial

A Court (second respondent in the court below) for adjudication by the Minister pursuant to s 26(2) of the Industrial Relations Act 1967 by way of a letter dated 29 December 1988.

The reference by the Minister was expressly in respect of dismissal without just cause or excuse and was not in respect of the downgrading of
B the four claimants from tappers to general workers with effect from 1 October 1988.

Jurisdictional error or errors of law

According to the learned judge, the jurisdictional error or errors of law
C committed by the Industrial Court, as contended by KJSB, may be summarized as follows:

(1) The second respondent (Industrial Court) went into issues which were not the subject matter of the Minister's reference;

(2) Erroneous attribution of bias and prejudice to the inquiry panel;

D (3) Erroneous finding that KJSB had waived or condoned the four claimants' absence;

(4) Erroneous conclusion that KJSB cannot invoke s 15(2) of the Employment Act 1955; and

(5) Erroneous reinstatement of the four claimants as tappers.

E Having scrutinized the judgments of the Industrial Court and the learned judge, we invited counsel to address us on the issue of the erroneous finding by the Industrial Court that KJSB had waived or condoned the four claimants' absence. This issue, in our view, would determine the appeal before us.

F Before proceeding to consider this issue we should deal with the contention of counsel for KJSB that this issue should not be considered by us on the ground that it was not pleaded in the statement of case (p 314 of the appeal record). He cited *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750 in support thereof. This court in *Amanah Butler* said at p 759:

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> First, we agree with Mr Lobo of Counsel for the respondent that the fate of the appellant's case must, ex necessitae rei, depend upon its pleadings before the Industrial Court. Indeed, the proposition relied upon by him is concluded by high authority.

The court proceeded at p 91 to quote a passage from the judgment of Mohd
H Eusoff Chin CJ (Malaysia), who formed the majority, in *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 at p 178, thus:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. It is true that the Industrial Court is not bound by all the technicalities
I of a civil court (s 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore

> the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.

Before the Industrial Court, NUPW by way of para 4 of the statement of case pleaded that the dismissal was without any or any just cause or excuse. The detailed facts may not have been pleaded but it is a matter of presenting the evidence to support the ground to be relied on by the party. In any event, from the appeal record, the issue of condonation was fully placed and argued before the Industrial Court. The Industrial Court therefore properly considered this issue in its judgment and found favour with NUPW. The same issue was again fully argued before the High Court and the learned judge considered this issue at length in his judgment but, however, did not agree with the finding of the Industrial Court and we will advert to this issue later.

In our view, even if this issue of condonation was not specifically pleaded, the fact that this issue was fully argued both in the Industrial Court and the High Court without any objection, would be too late in the day for KJSB's counsel to contend that this issue be precluded from being relied on by NUPW as a ground. In this respect the Supreme Court in *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 in dealing with the issue of certain defences were not pleaded and ought to be disregarded under O 18 r 7(1) of the Rules of the High Court 1980 but not objected to by the plaintiffs, held at p 185:

(1) The underlying well-known rationale for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts. However, when evidence represented a departure from the pleadings, it should be objected to when and where it was adduced, and it would be too late when it was only objected to later on, as in the final submission at the close of evidence in the instant appeal. Otherwise in the event of such an objection being accepted by the court, the party adducing such evidence may face the risk of being denied leave to amend his pleadings at that stage.

(2) Moreover, in the instant appeal evidence bearing on the two alleged defences was not such a radical departure but a mere development of what had been alleged by the defendants. Therefore, although the two alleged defences were material facts which ought to be pleaded, such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.

In our view, *Amanah Butler* and *R Rama Chandran* can therefore be distinguished with the present case and following *Superintendent of Lands & Surveys (4th Div) & Anor*, the contention of counsel for KJSB could not be accepted by us as the issue, as stated earlier, was fully canvassed and argued both in the Industrial Court and the High Court by both parties without any objection. In fact the issue of condonation was put to the Manager of KJSB

by way of cross-examination though referred to as waiver without any objection (p 393 of the appeal record).

So much for the procedural issue. We next have to consider whether there was evidence to support the condonation or is often referred to as 'waiver'. The doctrine of condonation has long been established in India, Malaysia, New Zealand, Canada, South Africa, Australia and Hong Kong (see the article on *Condonation as Waiver of the Employer's Right to Punish Misconduct* by Dr Abdul Majid in [1996] 2 MLJ at p xvii). In this respect, Neal J in *The Manager, Scudai Estate, Johore Bahru v Narayanan* [1960] MLJ 162 in dealing with the issue of dismissal by a master of the servant's misconduct, held that a master, with full knowledge of the servant's misconduct, electing to continue him in his service, cannot subsequently dismiss him for the offence which he had by his warning and subsequent employment condoned.

We agree to the principle of condonation as a waiver of the employer's right to punish for misconduct.

The Industrial Court in its judgment at pp 343–344 of the appeal record after having considered the evidence on the issue of waiver came to a finding as follows at p 344 thereof:

> This court finds as a fact the estate manager had waived the claimants' absence from 1 October 1988 to 15 October 1988 as stated by him in his sworn testimony. In the circumstances the letter of termination becomes irrelevant and invalid as their absence had been waived and condoned from 1 October 1988 to 15 October 1988.

The learned judge, however, was of the view that the Industrial Court had arrived at its finding based on an assumption which was unfounded. This is what the learned judge said in his judgment (p 20 of the appeal record):

> The second respondent had indeed arrived at its conclusion not based on testimony of the witness but merely on an assumption which was unfounded. The second respondent further failed to take into account the applicant's letter to the four workers dated 7 October 1988 and its rejection of their application for leave vide its letter dated 8 October 1988. The evidence before the court is that, if at all there was waiver or condonation, the applicant had only waived or condoned their absence from 1 October 1988 to 7 October 1988. *Their absence from 8 October 1988 was not waived or condoned and there was no evidence, oral or documentary, before the second respondent that their absence during this period was waived or condoned.* (Emphasis added.)

The learned judge seemed to have lost track of the fact that the termination letter (exh U1) was issued on 16 October 1988 to take effect on the same date and it was issued after the failure to reach a settlement at a conciliatory meeting at Kluang (Jabatan Buruh) on 15 October 1988 relating to the downgrading of the four claimants. If there had been a settlement on 15 October 1988, the issue of termination of the claimants on 16 October 1988 would not arise. If the condonation or waiver for the absence was from 1 October 1988 to 7 October 1988, as found by the learned judge was correct, then it logically follows that the termination should take effect from 8 October and not 16 October 1988!

Be that as it may, was the learned judge correct in concluding that there was no evidence, oral or documentary, that their absence during the period 8 October to 15 October 1988 was waived or condoned. In this respect we have to look at the evidence of KJSB's Manager which was considered by the Industrial Court at p 343 of the appeal record:

> Q: On 15 October 1988, there was a meeting at Kluang (Jabatan Buruh) a conciliatory meeting.
> A: Yes. No settlement was reached.
> Q: So *you issued Ex U1 — the termination letter on the afternoon of 15 October 1988.*
> A: *Yes.*
> Q: You have used s 15(2) in U1.
> A: Yes.
> Q: You are saying they have ceased to be employed with effect from 16 October 1988.
> A: Yes.
> Q: *Why did you chose 16 October 1988 in U1.*
> A: *Because we have waived their absence from 29 September 1988, the date of the verdict of the inquiry. We have waived their absence.*
>
> (Emphasis added.)

On the above evidence, the Industrial Court came to this finding (p 344 of the appeal record):

> The Manager having clearly in unambiguous and explicit language said that the reason he issued Ex U1 termination letter on 16 October 1988 is because he had waived their absence from 29 September 1988 to 15 October 1988. Surely if there has been a waiver of their absence, there has been condonation of the offence and therefore there was no basis, to issue a termination letter.

No doubt, it was not expressly stated by the estate manager that the waiver was up to 16 October 1988 but from the tone of his evidence, the irresistible inference must be that the waiver was up to 15 October 1988. This is borne out by his answer to the next question put to him (p 393 of the appeal record):

> Q: On 16 October 1988 you decided not to waive their absence anymore?
> A: Yes.

The Industrial Court then went on next to say:

> The manager having given an explanation as to why he chose the date 16 October 1988 to issue exh U1 the letter of termination did a virtual turnaround and said as follows:
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> 'Q: Up to 15 October 1988 from 29 September 1988 you have waived the absence of the claimants.
> A: *I now say*, I have waived their absence from 29 September 1988 to 8 October 1988.'
>
> (Emphasis added.)

By the use of the words 'I now say' clearly showed that the witness tried to correct himself that prompted the Industrial Court to say that the witness did a 'virtual turnaround'. This is a matter of credibility of the witness and

A is within the competence and jurisdiction of the Industrial Court to determine his credibility.

The next question to consider is whether the learned judge was entitled to disturb the finding of facts and the credibility of witnesses by the Industrial Court and substitute with that of his own.

B This court in *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137 at p 165 sets out the role of a High Court in public law remedies, thus:

> The role of a High Court when exercising the powers conferred upon it by para 1 of the Schedule to the Courts of Judicature Act 1964 in the context of public law remedies was explained by the Federal Court in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at pp 393–394 as follows:
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> > The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh v Election Tribunal* AIR 1955 SC 425 at p 429:
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> > > 'That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and *one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense* ... '. (Emphasis added.)
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F The learned judge relied heavily on the High Court case of *Pan Global Textile Bhd Penang*, where the said case relates to the issue of the Industrial Court considering and taking into account the downgrading of the respondent/claimant when the subject matter of the Minister's reference was the respondent/claimant's subsequent dismissal by the employer for refusing to turn up for work in the downgraded position. By the time this appeal came before us *Pan Global Textile Bhd, Penang* was overturned by G this court and the order of the Industrial Court reinstated. This court in overturning the learned judge's judgment said at pp 164–165:

> Second, the learned judge appears to have assumed the task of making a finding that based on the facts of the case, the appellant's dismissal was justified. What the learned judge did smacks of the exercise of appellate power when the jurisdiction he was exercising was purely supervisory. The question H whether the appellant's dismissal was justified or amounted to an act of victimization was one which was for the Industrial Court to determine. What the judge did, in effect, was to reverse the decision of the Industrial Court and to substitute his own decision therefor. This, needless to say, was wrong.

I In our view, the learned judge clearly was wrong to make a finding that the Industrial Court based its decision on no evidence and that its decision was perverse relying on *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 when there was more than

ample evidence before the Industrial Court, as stated by us earlier, that the dismissal of the claimants was without just cause or excuse, that is, their absence was condoned or waived by KJSB. In the circumstances, it was wrong for the learned judge in a supervisory role to substitute his own finding of fact when such role is much within the province of the Industrial Court. On the evidence before it, the Industrial Court was more than justified to come to such finding of fact and to its assessment of the credibility of the Estate Manager. This court in *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585 at p 2590 said:

> The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. However widely understood the proposition in *R Rama Chandran* and *Amanah Butler* may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.

In short, the Industrial Court correctly concluded that the claimants' absence from 29 September 1988 to 15 October 1988 was condoned or waived by KJSB. In the event the termination of the claimants' employment by KJSB was rightly found by the Industrial Court to be invalid.

On this issue alone, NUPW should succeed in this appeal.

For completeness, the other errors allegedly committed by the Industrial Court can be best answered by the judgment of this court in *Ang Beng Teik* (the facts of which are more or less similar to the facts of this appeal before us). This court in *Ang Beng Teik* at p 165 said:

> To summarize, this is a case where the Industrial Court had to determine whether the termination of the appellant was a bona fide exercise of managerial power or a case of unjustified dismissal cloaked as a termination simpliciter. In carrying out that task, the Industrial Court had to deal with the appellant's conduct in failing to assume the post to which he had been demoted and his reasons therefor. It also had to deal with the respondent's contention that the appellant's refusal to take up his demoted post entitled it to terminate the appellant's services. It did all this and at the end of the exercise came to the conclusion that the whole process — the inquiry followed by the demotion and the eventual termination — were designed to victimize the appellant. That is a conclusion that was well within the scope of its inquiry. It did not commit any error of law when performing the task entrusted to it.

This is what the Industrial Court said at pp 344–345 of the appeal record:

> *Second*:
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> Assuming the Manager had only waived the four claimants' absence only from 29 September 1988 to 8 October 1988, the claimants have then been absent from work without prior approval, for another six days from 9 October 1988 to 15 October 1988. Does this absence fall within the ambit of s 15(2) of the Employment Act 1955?
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> Section 15(2) is only a deeming provision, a presumption of breach of a contract of service which can be rebutted by a workman showing he had a reasonable excuse for such absence and has informed his employer at the earliest opportunity of his absence.

A The claimants had a reasonable excuse to be absent which was known to the management from 29 September 1988 that they were pursuing their grievance of being demoted from tappers to general workers and it was reasonable for them to wait for the outcome of the conciliation meeting at Kluang Labour Office.

In the circumstances apart from a perverse finding of guilt and a breach
B of natural justice the contention of the management that the claimants have terminated their contract of service by failure to turn for work without a valid excuse is misconceived. The management's claim in Exh U1 that the claimants have ceased to be employees of the estate ought in the circumstances to be treated as victimisation, an unfair labour practice and a dismissal by the management of the claimants without just cause or excuse.

C In our view, it was well within the scope of the Industrial Court to come to such a finding.

We were satisfied that the Industrial Court did not commit any error or errors of law and had correctly considered the facts before it and the law applicable thereto. It was the learned judge who was wrong and who had
D exceeded his role.

In the circumstances, the appeal was allowed with costs here and below. The order of the Industrial Court was restored and we ordered the deposit to be refunded.

Appeal allowed.

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Reported by Jafisah Jaafar

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